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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91217589
Party	Plaintiff Rhythm Holding Limited
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RHYTHM HOLDING LIMITED, Opposer, v. J & N SALES, LLC, Applicant.	Opposition No. 91217589

OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO COMPEL

Opposer RHYTHM HOLDING LIMITED, by its counsel, responds as follows to the Motion to Compel filed by Applicant herein [paper no. 8].

Opposer submits that Applicant has not satisfied the requirement of Rule 2.120 that, before bringing a motion to compel, the movant must have made a good faith effort to resolve or narrow the issues raised in its motion. Here, despite Opposer Rhythm's twice suggesting that Applicant pare down its interrogatories to a reasonable number, Applicant refused to do so. As to Opposer Rhythms's objections to Applicant's production requests, Applicant never explained why Opposer's objections were improper, or why the objected to requests were relevant or not unduly burdensome on their face.

Despite Opposer's conviction that Applicant's interrogatories far exceed the numerical limit set by Rule 2.120(d), as explained more fully below, Opposer Rhythm has now served responses and objections to those interrogatories.

As to Applicant's document requests, Opposer had produced some 1,300 documents before Applicant filed its motion to compel, and it has since produced more than 2,700 additional documents. Opposer stands by its objections to the document requests, as explained below, and believes that it has fulfilled its discovery obligations fairly and in good faith.

INTRODUCTION AND BACKGROUND

This is a simple Section 2(d) opposition proceeding involving overlapping goods and confusingly similar marks. Standing and priority are not in issue in view of Opposer's three pleaded registrations. No counterclaim has been filed.

Because the involved goods are in part identical (namely, pants, shirts, t-shirts, sweatshirts, shorts, and caps) the Board must presume that these goods travel through the same channels of trade to the same classes of consumers. There are no limitations in the application or the pleaded registrations as to the cost or price of the goods, and so the Board must presume that they include low priced items bought with nothing more than ordinary care.

As to the marks, Applicant has merely taken Opposer's registered mark RHYTHM and added the words IN BLUES, The ordinary consumer would undoubtedly perceive Applicant's mark to be a variation or sub-label of Opposer's RHYTHM brand.

Nonetheless, Applicant demands from Opposer Rhythm virtually every piece of paper in its files, regardless of relevance to the issues in this case and regardless of the unfair burden placed on Opposer in responding to such sweeping demands.

INTERROGATORIES

Although Opposer Rhythm has served its responses and objections to Applicant's interrogatories, as appropriate in light of their sweeping scope, Opposer continues to maintain that Applicant's interrogatories exceed in number the limit of seventy-five, including sub-parts, set forth in Rule 2.120(d). Not only do Applicant's interrogatories demand identification of a long list of different documents, but the burdensomeness of these interrogatories is compounded by Applicant's definition of the word "identify," which requires as to each document the following seven pieces of information:

(i) the type of document,

(ii) general subject matter,

(iii) date of the document,

(iv) author(s) of the document,

(v) addressees,

(vi) recipient(s), and

(vii) the location and identity of the person having possession of the document.

As an example, Applicant's Interrogatory No. 3, after listing a number of different types of documents used for any of a number of listed activities, requires that Rhythm "identify each document concerning each subject." As pointed out by Opposer's counsel,[1] that interrogatory, with its variations and permutations, by itself exceeded the 75-interrogatory limit of Rule 2.120(d), without even taking into consideration the seven-part definition of "identify."

[1] See letter dated February 20, 2015 (8 TTABVUE 19).

In view of the Board's limited jurisdiction and the simple and straightforward nature of this particular proceeding, the scope of Applicant's interrogatories (and its document requests) is wholly out of proportion with its discovery needs. As the Board recently observed in *Joshua Domond v. 37.37, Inc.*, 113 USPQ2d 1264, 1266 (TTAB 2015):

> When it comes to serving discovery, the parties are expected to take into account the principles of proportionality with regard to discovery requests such that the volume of requests does not render them harassing and oppressive and are expected to consider the scope of the requests as well as to confer in good faith about the proper scope of discovery so as to minimize the need for motions. *See* Trademark Rule 2.120(a); Fed. R. Civ. P. 26(f); *Phillies*, 107 USPQ2d at 2153; *cf. Frito-Lay North America Inc. v. Princeton Vanguard LLC*, 100 USPQ2d 1904, 1908-10 (TTAB 2011). (Board applied principle of proportionality in case involving discovery of electronically-stored information).

Nonetheless, in order to avoid the waste of more time on this issue, and in light of Applicant's comments regarding what it meant the supposed scope of the interrogatories to be, Opposer Rhythm decided to respond to the interrogatories.

Document Requests

With regard to Applicant's document requests, Opposer Rhythm maintains its objections as stated in its responses.

Like its interrogatories, Applicant's document requests are completely out of proportion to the scope of this simple proceeding. For example, Document Request No. 5 demands "[a]ll documents concerning Opposer's marketing and sale of wearing apparel in connection with a trademark comprising the word 'rhythm.'" Since Opposer's business is marketing and selling wearing apparel under trademarks comprising or containing the

word “rhythm,” this request calls for every single document that Opposer possesses. Request No. 6 demands a sample or photo of every item Rhythm has ever sold, another unfairly burdensome demand.

Other requests seek documents that could not conceivably be relevant to this proceeding: for example, all documents relating to the “style and design” of Rhythm’s products (Request No. 12); and all documents concerning any rebranding, modification, or expansion of a product line (Request No. 18). Applicant makes no attempt to explain why Opposer’s objections on the ground of relevance are unfounded or why the objected-to requests are proper. Instead it chose to file the instant motion to compel.

Opposer Rhythm has now produced more than 4,000 documents in response to Applicant’s document requests, including sales information, catalogues, correspondence with third parties, and a variety of other materials. Rhythm suggests that, if Applicant is really interested in proceeding reasonably and in good faith, it should withdraw the instant motion.

Conclusion

For the foregoing reasons, Applicant’s motion to compel should be dismissed as moot with regard to its interrogatories, and denied as meritless with regard to its document requests.

RHYTHM HOLDING LIMITED

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Applicant this 22nd day of May, 2015, by mailing a copy thereof via first-class mail, postage pre-paid, to James A. Power, Jr., Esq., Power Del Valle LLP, 233 West 72nd Street, New York, NY 10023.

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John L. Welch